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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 KEN MARABLE,

8 Plaintiff,

9 v.

10 MARK NITCHMAN, et al.,

11 Defendants.
12

Case No. C05-1270MJP

ORDER DENYING MOTION
FOR JUDGMENT AS A
MATTER OF LAW

13 This matter comes before the Court on Defendants' motion under Federal Rule of Civil
14 Procedure 50(a) for judgment as a matter of law, filed at the close of Plaintiff's case-in-chief.
15 (Dkt. No. 154.) Defendants argue that they are entitled to qualified immunity. Although
16 qualified immunity issues should generally be decided early in litigation, see Saucier v. Katz,
17 533 U.S. 194, 200-01 (2001), courts have considered the issue on Rule 50 motions. See Helena
18 v. City of San Francisco, No. C04-0260CW, 2006 WL 1140953, at *9-11 (N.D. Cal. 2006)
19 (granting Rule 50(b) motion for judgment as a matter of law on qualified immunity grounds);
20 Thompson v. City of Tucson Water Dept., No. CIV 01-53-TUC-FRZ, 2006 WL 3063500
21 (denying Rule 50(b) motion for judgment as a matter of law on qualified immunity); see also
22 Settlegoode v. Portland Pub. Schools, 371 F.3d 503, 513 n.7 (reversing lower court's Rule 50(b)
23 qualified immunity determination).


24 Defendants are entitled to qualified immunity if "their conduct does not violate clearly
25 established statutory or constitutional rights of which a reasonable person would have known."
26 Settlegoode, 371 F.3d at 512 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Where,
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1 as here, the plaintiff is a government employee claiming a violation of his free speech rights, he
2 must show “(1) that his speech involved a matter of public concern, and (2) that the interests
3 served by allowing him to express himself outweighed the state’s interest in promoting
4 workplace efficiency and avoiding workplace disruption.” Id. (citing Pickering v. Bd. of Educ.,
5 391 U.S. 563, 568 (1968)). Here, the Ninth Circuit has already determined that Mr. Marable’s
6 speech involved matters of public concern. See Marable v. Nitchman, 511 F.3d 924, 932 (9th
7 Cir. 2007). To determine whether Mr. Marable’s free speech interests outweigh his state
8 employer’s interests, the trier of fact must consider whether Defendants have shown “actual
9 injury to . . . legitimate interests beyond the disruption that necessarily accompanies such
10 speech.” Settlegoode, 371 F.3d at 513 (quoting Keyser v. Sacramento City Unified Sch. Dist.,
11 265 F.3d 741, 749 (9th Cir. 2001) (internal quotation marks omitted). Factors relevant to that
12 analysis include whether the speech: “(i) impairs discipline or control by superiors, (ii) disrupts
13 co-worker relations, (iii) erodes a close working relationship premised on personal loyalty and
14 confidentiality, (iv) interferes with the speaker’s performance of her or his duties, or (v)
15 obstructs the routine operations of the office.” Fazio v. City and County of San Francisco, 125
16 F.3d 1328, 1331 n.1 (9th Cir. 1997).

17 Given the evidence presented during the first three days of trial, the Court cannot
18 conclude “that a reasonable jury would not have a legally sufficient evidentiary basis to find for”
19 Plaintiff on these factors. See Fed. R. Civ. P. 50(a)(1). The Court will instruct the jury on these
20 elements and Defendants may renew their motion after the jury renders its verdict. The Court
21 will then revisit the legal issue in light of the jury’s findings. Defendants’ motion is therefore
22 DENIED.

23 The clerk is directed to send copies of this order to all counsel of record.

24 DATED: August 13, 2008.

25 
26 Marsha J. Pechman
27 United States District Judge